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Citation:

Rushiella Songea, The Role of Behavioral Experts in Child Sexual Abuse Cases, 67 THRHR 76 (2004)

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Thu Jan 24 03:15:14 2019

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# The role of behavioural experts in child sexual abuse cases\*

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## OPSOMMING

In hierdie artikel word die rol van gedragsskenners soos psigiaters en sielkundiges in sake waarin die seksuele misbruik van kinders ter sake is, bespreek. Die aard en beperkinge van hierdie kenners se getuienis word onder andere ondersoek. Daar word geargumenteer dat die houe omvattend gebruik moet maak van gedragsskenners in sake waarin die seksuele misbruik van kinders besleg moet word. Met verwysing na onlangse regspraak word aangedui hoe hierdie soort getuienis die beoordelaars van feite (voorsittende beampies) kan help om tot die waarheid deur te dring.

## 1 INTRODUCTION

There is consensus among writers and academics that sexual abuse, especially abuse of children, has become a national problem in South Africa<sup>1</sup> second only, if not equal to, the AIDS crisis. In fact, the war against AIDS can never be won as long as incidents of rape of women and men and sexual abuse of children are not contained. Sexual abuse in general, and child abuse in particular, are complex problems that involve cultural, social and behavioural issues. Child sexual abuse is difficult to detect – hence holding perpetrators accountable and protecting child victims from further harm have become a serious social and judicial concern.

I am of the view that expert evidence can play a crucial role in the prosecution of child sexual abuse cases. The peculiar nature of these cases presents serious challenges for presiding officers. In many cases, the acts occur in secret, the child victim is often very young (three to four years old), the only witness, and the abuser is often someone known to the victim, someone the victim trusts and respects.<sup>2</sup> In cases where abuse is detected and the victim refuses to testify,<sup>3</sup> the stigma which surrounds sexual offences often creates a conspiracy of silence.

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\* This article is derived from the author's thesis *Aspects of sexual abuse of children: A comparative study* (UP 2003).

1 Collings "Childhood sexual abuse in a sample of South African males: Prevalence and risk factors" 1991 *South African of Psychology* 153; SA Law Commission Project 107: *Sexual offences: Process and procedure* (2001).

2 Levy "Using 'scientific' testimony to prove child sexual abuse" 1989 *Family LQ* 383 384; McGillivray "Expanding the narrative of child sexual abuse" 1994 *Int J Children's Rights* 67 (McGillivray) 75; Müller *Child abuse. An educational and medical approach to important issues and associated problems* (1989) 9; see also *S v J* 1998 4 BCLR 424 (CC) where the offender was a policeman.

3 Key "The child witness: The battle for justice" 1988 *De Rebus* 54 55; see also Müller 42.

Family members and friends seldom report or discuss a known sexual incident.<sup>4</sup> Research abounds with concerns about the inadequacy of, or lack of, training among some professionals. Müller<sup>5</sup> asserts that insufficient training among professionals who deal with these cases has impeded their ability to adequately deal with the problem. A disclosure by the victim of the abuse and the identification of the alleged perpetrator still do not guarantee a conviction. The behaviour of the victim may cast doubt on his or her reliability. It is for these reasons that I argue that expert evidence should always be used in child sexual abuse cases.

The section below discusses rules relating to the admission of expert evidence. The different kinds of expert evidence used in child sexual abuse cases are also discussed. The last part of the article suggests ways in which the evidence of behavioural experts may be used effectively in these cases.

## 2 QUALIFYING AS AN EXPERT

Reliance on expert evidence in criminal proceedings is one method by which judicial officers recognise and legitimise the existence of certain facts.<sup>6</sup> The rationale for the introduction of opinion evidence is the possibility that it can assist the court in arriving at the truth. Expert evidence must not only assist the court in coming to an objective decision, but must also be relevant to the point at issue. The test for admissibility of expert evidence is whether the witness possesses more knowledge on the given subject than is generally known or, whether due to his or her special skill, training or experience the expert is in a better position to give an opinion or make deductions from proven facts than the court itself.<sup>7</sup> Expert opinion, therefore, is specialised evidence going beyond the knowledge of lay people.<sup>8</sup> In *Menday v Protea Assurance Co Ltd*<sup>9</sup> Addelson J stated:

“In essence the function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his skill, training or experience, the reasons for the opinion he expresses are acceptable.”<sup>10</sup>

In *Holtzhauzen v Roodt*,<sup>11</sup> the plaintiff sued the defendant for defamation arising from the defendant’s statements to certain people that the plaintiff raped her. The defendant relied on expert evidence to corroborate her allegations. The court had

4 McGillivray 75.

5 See fn 3 above.

6 According to Meintjies-Van der Walt “The representation of expert evidence at trials in South Africa, The Netherlands and England and Wales” 2001 *Stell LR* 283, expert evidence may also be introduced to establish that a crime has been committed, that a particular person was at a given place at a given time, or whether something was done with a particular instrument, etc.

7 Hoffmann and Zeffertt *The South African Law of evidence* (1989) 84; see also Meintjies-Van der Walt “Science friction: The nature of expert evidence in general and scientific evidence in particular” 2000 *SALJ* 771 772–773.

8 *Ibid*; and Meintjies-Van der Walt “Expert evidence and the right to a fair trial: A comparative perspective” 2001 *SAJHR* 301.

9 1976 1 SA 565 (E) 569.

10 569B–C.

11 1997 4 SA 766 (W).

to consider the admissibility of expert opinion. In so doing, Satchwell J laid down the relevant principles:

- “(i) Firstly, experts should only be called to give evidence on issues that require specialized skill or knowledge, it is important for the court to make this determination before resorting to expert evidence.<sup>12</sup>
- (ii) Secondly, the court took judicial knowledge of the fact that psychologists and psychiatrists are at times called upon by the courts as expert witnesses, however, the court cautioned against elevating the expertise of such witnesses to such heights as to lose sight of their own capabilities and responsibilities.<sup>13</sup>
- (iii) Thirdly, the witness must be a qualified expert. This can be determined by establishing whether the witness has undergone a course dealing with the matter at hand, or has the necessary skill or experience as will render him or her an expert in a particular subject. The expertise need not have been acquired professionally.<sup>14</sup>
- (iv) Fourthly, the facts upon which the expert bases his or her opinion must be proved by admissible evidence. The facts may either be within his or her personal knowledge or may be based on facts proved by others.<sup>15</sup>
- (v) Fifthly, the guidance offered by the expert must be sufficiently relevant to the issue which is to be determined by the court.<sup>16</sup>
- (vi) Lastly, opinion evidence must not replace the function of the court, that is, that of decision making, experts should only play an advisory role.”<sup>17</sup>

## 2.1 The nature and limits of behavioural evidence in child sexual abuse cases

The prevalence and complex nature of sexual abuse have impelled the courts to rely on the evidence of behavioural scientists such as psychologists and psychiatrists. These experts have been called upon to assist the court to better understand a child’s demeanour, inconsistent reports, reluctance to testify and recantation.<sup>18</sup> Serrato<sup>19</sup> argues that in most cases children are not ideal witnesses because of their developmental and psychological immaturity. The child may be unable to give consistent spontaneous reports of his or her experiences, or he or she may delay reporting the abuse because of fear of not being believed, or intimidation from other family members. Regardless of the cause, however, the danger exists that the court might interpret delayed disclosure as evidence of fabrication. Behavioural experts, therefore, play a crucial role in explaining to the court the victim’s seemingly abnormal behaviour as normal for children who have been sexually abused. Expert evidence is also needed to dispel inaccurate perceptions and misconceptions held by the courts, thereby enabling them to better assist and evaluate the child witness.<sup>20</sup>

12 772C–D.

13 772E–F.

14 772G–H.

15 772H–I.

16 773B.

17 773B–C.

18 Summit “The child sexual abuse accommodation syndrome” 1983 *Child Abuse and Neglect* 177. The list is not exhaustive.

19 “Expert testimony in child sexual abuse prosecutions: A spectrum of uses” 1988 *Boston U LR* 155 159.

20 Some of these myths/misconceptions are that children are abused by dirty old men who are strangers to them, or that a victim will tell someone immediately after being sexually abused.

The section below discusses the different approaches that behavioural experts apply in determining the occurrence of sexual abuse, and the impact of these on the outcome of cases.

## **2.2 Expert testimony describing behavioural patterns commonly observed in sexually abused children**

The expert is allowed to describe behavioural patterns observed in sexually abused children as a class. This testimony does not focus on a particular child. The main purpose of this testimony is to inform the court on behavioural patterns commonly observed in abused children. The expert does not offer a direct opinion on the ultimate question of whether abuse has occurred.

The expert might testify that sexually abused children delay reporting the abuse or recant allegations previously made against the alleged offender. The expert is not vouching for the witness's truthfulness or reliability. Courts allow their testimony because they deem such information to be beyond their knowledge and understanding. Impeachment usually takes two forms, firstly, the defence might challenge a victim's reliability by asserting that he or she should not be believed because of failure to report the abuse for a substantial period of time. Secondly, the defence might argue that the child retracted allegations previously made.<sup>21</sup> The prosecution must therefore call an expert to explain to the court some of the factors that cause delay or inform the court that such behaviour is common in sexually abused children. An expert is also able to explain to the court that recantation sometimes occurs when the alleged perpetrator or other members of the family threaten the child. Myers *et al*<sup>22</sup> support the practice of admitting evidence to explain why sexually abused children delay reporting or recant allegations previously made. They, nevertheless, caution that professionals who deal with these cases should always bear in mind that neither delay nor recantation proves abuse. Instead, this testimony should be confined to showing that a recantation or delay in reporting does not necessarily imply that a child is untruthful.<sup>23</sup>

## **2.3 Expert testimony matching typical characteristics of sexually abused children with the victim's symptoms**

The expert compares the complainant's symptoms with those of sexually abused children and explicitly or impliedly concludes that the child witness has been abused.

The expert addresses only the general characteristics of a sexually abused child, and not the behaviour of the particular child. The diagnosis can take place without the expert listing the common symptoms. He or she may not have evaluated the child. He or she addresses general clinical patterns observed in sexually abused children by himself or herself and by others.<sup>24</sup> Admission of this

21 Myers *et al* "Expert testimony in child sexual abuse litigation" 1989 *Nebraska LR* 1 3.

22 *Ibid*; see also McCord "Expert psychological testimony about child complainants in sexual abuse prosecutions: A foray into the admissibility of novel psychological evidence" 1986 *Journal of Criminal Law and Criminology* 1 2; Baker "Psychological expert testimony on a child's veracity in child sexual abuse prosecutions" 1990 *Louisiana LR* 1039 (Baker) 1040.

23 Roe "Expert testimony in child sexual abuse cases" *University of Miami LR* 1985 97 108; Myers *et al* 61.

24 McCord 64; Lorenzen "The admissibility of expert psychological testimony in cases involving the sexual misuse of a child" 1988 *U Miami LR* 1033 1041.

testimony has presented problems. Mental health professionals are divided about tests regarding behavioural characteristics of sexually abused children. Serrato<sup>25</sup> supports the admission of this testimony and argues that expert evidence on whether a child has been sexually abused should be admissible in the same way as expert evidence as to whether injury is consistent with the use of a certain weapon. The author concedes that, although the reliability of such evidence may be raised, child sexual abuse experts are better suited than the court to evaluate facts and symptoms to determine whether sexual abuse has occurred. It is submitted that there is merit in this argument. However, experts have to bear in mind that the child's responses may also be affected by other factors, such as his or her social background, culture or whether he or she has shared a bedroom with adults and saw them engaged in sexual activities.

Lorenzen<sup>26</sup> asserts that experts should not be allowed to testify as to the occurrence of sexual abuse or express an opinion on the issue because they cannot make a reliable determination on the matter. The author asserts that it is not possible to know for a fact whether a child was abused. Testimony to determine this issue may be based on a continuum of factors, which may lead to a clinical judgement that sexual abuse is the most likely explanation in certain cases. Lorenzen<sup>27</sup> states that expert testimony relating to sexual abuse should be considered as falling along a spectrum. At one end of the spectrum is an opinion that abuse has occurred. At the opposite end of the spectrum is an opinion that a child demonstrates age-inappropriate sexual knowledge and behaviour.<sup>28</sup>

Myers *et al*<sup>29</sup> assert that expert testimony, which states that a child has been abused, usually presents problems. They argue that professionals in this area agree that experts can competently determine whether a victim exhibits age-inappropriate behaviour, but cannot determine whether sexual abuse has occurred. The claims of Myers *et al* are to a large extent supported by Roe.<sup>30</sup> She argues that testimony about emotional and behavioural reactions of sexually abused children necessitates a clinical expert to testify that certain behaviours are typical of abused children. Initially, professionals believed that there was a cluster of symptoms which could be identified and could accurately discriminate abused from non-abused children. However, on-going research on sexual abuse still has failed to come up with scientific support for the notion of a unique or universal response to sexual abuse.<sup>31</sup> Roe<sup>32</sup> asserts that the presence of age-inappropriate behaviour or aggressive sexual behaviour in young children cannot definitely be linked to a history of sexual abuse.

#### **2 4 Expert testimony on the veracity of a particular child**

The expert vouches for the complainant's truthfulness regarding the sexual abuse allegation. The expert assumes the role of advisor to the court on the weight it should attach to the testimony before it. The expert is invited to affirm the witness's credibility or truthfulness.

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25 187.

26 1048.

27 1041.

28 Myers *et al* 70.

29 *Ibid.*

30 102–104.

31 *Ibid.*

32 *Ibid.*

Academics seem to be divided on whether experts should determine a child's credibility or truthfulness.<sup>33</sup> Professionals<sup>34</sup> who argue against the admissibility of such evidence assert that there is a real danger that the expert may inadvertently usurp the court's fact-finding function. In addition, the trial may become a battle of experts, in that if the state is allowed to call on an expert to verify the child's truthfulness, the defendant will also be entitled to call a witness to testify to the contrary.<sup>35</sup> Lorenzen<sup>36</sup> fears that the child may be subjected to repeated psychological and psychiatric testing, invasion of privacy and subsequent psychological damage.

Serrato,<sup>37</sup> who has argued for the admissibility of such evidence, responds to these arguments by asserting that a battle of experts is unlikely because it is within the judge's discretion to control the number of experts examining the child witness. He concludes that the argument does not justify the inadmissibility of such testimony. Serrato concedes that a calling of experts may be time-consuming but this does not justify exclusion of such a battle, especially if it is customary for the courts to permit it in other contexts, such as hearings on an insanity defence. It has been argued that courts should not permit testimony regarding the credibility of a particular child witness on the grounds that it addresses the question of guilt or innocence. This is a matter reserved exclusively for the court. Serrato responds to this argument by asserting that such an invasion will occur only if the judge fails to exercise his or her discretion.

Roe<sup>38</sup> asserts that the courts are capable of evaluating credibility without the assistance of an expert witness. In her view, mental health professionals have no special ability to determine whether someone is telling the truth. Such an expert opinion is improper under all circumstances. Serrato<sup>39</sup> argues that it will be an anomaly to allow an expert witness to testify in regard to the victim's characteristics and behaviours generally exhibited by sexually abused children, and then prohibit inferences drawn from the expert's observation. He asserts that, from their observations of children alleging sexual abuse, social scientists are better qualified than the courts to draw conclusions on veracity.

English courts are also divided on this issue. In *R v Robinson*<sup>40</sup> the accused was charged with indecent assault and rape of a fifteen-year-old child. On appeal, the accused argued that the psychologist's evidence should not have been admitted because it amounted to an attempt by the crown to bolster the reliability, if not the veracity, of the complainant. Taylor CJ held that, in a proper case, evidence from a psychiatrist or psychologist may be insufficient to show that a witness or a confession is unreliable. The court further stated that "the crown could not call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness reliable".<sup>41</sup>

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33 Roe 104; McCord 5; Serrato 182–184; Lorenzen 1040.

34 Roe 104; Lorenzen 1067.

35 Lorenzen 1067.

36 *Ibid.*

37 183.

38 See fn 30 above.

39 181.

40 [1994] 3 All ER 346.

41 352B–C.

No case was made (against the appellant) during cross-examination that the complainant was prone to suggestion or to fantasy as a result of her mental impairment. No evidence was called for the defence impugning the complainant's reliability. The court held that the evidence of the educational psychologist should not have been admitted.

In *Re M and R*,<sup>42</sup> the respondents were convicted of sexually abusing their children. It was contended on behalf of the children that the judge, having found that there was a real possibility that sexual abuse had occurred, erred in not taking into account the allegations of sexual abuse in his assessment of the welfare of the children. Butler-Sloss LJ supported the trial judge's conclusion that an expert can express an opinion on a complainant's psychiatric state and propensity to fantasise, and can support the child's statement by expressing his or her opinion that the victim is apparently credible. The judge, nevertheless, concluded that: "What . . . was not admissible was any direct expression of opinion that A (complainant) was telling the truth, and not telling a malicious lie".<sup>43</sup>

Butler-Sloss LJ stated that judges should always keep in mind that the ultimate decision and all matters of relevance and weight are for them to decide upon. The judge elaborated on this assertion as follows:

"But when the judge is of the opinion that the witness's expertise is still required to assist him to answer the ultimate questions (including where appropriate, credibility) then the judge can safely and gratefully rely on such evidence, while never losing sight of the fact that the final decision is for him."<sup>44</sup>

The Youth and Criminal Justice Act<sup>45</sup> has clarified the nature and extent of expert evidence. It provides that all persons, whatever their age, are competent to give evidence.<sup>46</sup> The party calling the witness has the onus of satisfying the court on a balance of probabilities that the witness is competent to give evidence. Expert evidence may be received on this question. Evidence may be given under oath if the witness is above fourteen years and appreciates the solemnity of the occasion and the responsibility to tell the truth.<sup>47</sup> If the witness is able to give intelligible testimony, he or she will be presumed to have sufficient appreciation of those matters. Intelligible testimony is defined as the ability of a witness to understand questions and give answers that can be understood. Expert testimony can be received on whether the testimony is intelligible.<sup>48</sup>

### **3 THE USE OF EXPERT EVIDENCE IN CHILD SEXUAL ABUSE CASES**

#### **3 1 Case law in South Africa on the evidence of behavioural experts**

I am of the view that the nature of child sexual abuse, including the fact that victims are in most cases young and unable to relate their experiences, makes the reliance on expert evidence extremely crucial.

42 [1996] 4 All ER 239.

43 252C–D.

44 254A–B.

45 1999 (UK).

46 S 53(1).

47 S 55(3).

48 *Ibid.*

In *Holtzhausen v Roodt*<sup>49</sup> Satchwell J stated the admissibility and relevance of expert evidence in this manner:

“[I]t would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge or skill, to attempt to draw inferences from facts which have been established by evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw inferences which I am required myself to draw.”<sup>50</sup>

Experts may be called on a variety of topics. Firstly, an expert may be called to explain the evidence given. In *S v S*<sup>51</sup> the appellant was convicted in the lower court of the rape of an eleven-year-old-girl. On appeal it was contended on the appellant’s behalf that the magistrate had failed to observe the cautionary rule in respect of the evidence of children. After analysing traditional objections to children’s evidence<sup>52</sup> and debunking assumptions made in regard to their evidence, Ebrahim JA stated the following:

“A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely shortcomings in such evidence in the manner suggested by Spencer and Flin (op cit). To reach an intelligible conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society.”<sup>53</sup>

Secondly, courts can rely on expert evidence in order to better understand children’s cognitive abilities. In this regard, a psychologist or psychiatrist may give evidence regarding the accuracy of a child’s evidence. In *S v S*,<sup>54</sup> responding to the allegation that children’s memories are unreliable, Ebrahim J stated that research has shown that children generally have a good recall of events. The judge also asserted that research has shown that children do not fantasise over things that are beyond their direct or indirect experience. The judge concluded his analysis of the traditional objections to children’s evidence by conceding that children, like adults, might be suggestible. However, the degree of suggestibility can be minimised by questions especially designed to overcome known pitfalls.

Thirdly, evidence of a psychologist or psychiatrist may be relied upon to explain the behaviour of abused children which lay people (including judges) may find difficult to understand. Traumatized children may exhibit behaviour such as violence, mood swings, headaches and irrational fears. In *S v M*<sup>55</sup> the appellant was convicted in a regional court of incest with his daughter. On appeal, Melusky AJA noted that the regional court had relied on the evidence of a psychologist and a social worker. They both stated that the complainant exhibited symptoms that were typical of sexually abused children. Melusky

49 1997 4 SA 766 (W).

50 778H-I.

51 1995 1 SACR 50 (ZS).

52 These objections are that children’s memories are unreliable, that children are egocentric, highly suggestible, have difficulty distinguishing fact from fantasy, make false allegations, particularly of sexual assault and do not understand the duty to tell the truth.

53 60A-C.

54 See fn 51 above.

55 1999 2 SACR 548 (SCA).

AJA stated that the conclusions drawn by the experts were admissible in evidence. However, the judge felt that these symptoms might have been attributable to other factors which had nothing to do with sexual abuse.

Fourthly, an expert may be called to explain why victims of sexual abuse delay reporting or recant allegations previously made. In *Holtzhausen v Roodt*<sup>56</sup> Satchwell J acknowledged the inability of a judicial officer to understand fully the kaleidoscope of emotion and experience of both the rapist and the survivor. The judge further stated:

“[I]f indeed there are particular reasons, known only or known particularly to those who work with rape survivors and who have experience in this field, why rape survivors frequently do not take the first opportunity to make known such an assault and to seek help, then it would ill-behave me as a Judge of the High Court to turn my ear against the opportunity to gain better understanding from an available expert.”<sup>57</sup>

Lastly, for the purposes of sentencing, it is of paramount importance that the presiding judge rely on a psychologist to explain the effect and trauma of the abuse on a young child. In *S v Abrahams*<sup>58</sup> the accused was found guilty of raping his fourteen-year-old daughter. On appeal, the sentence was increased to the term of twelve years. This case raised some important issues, namely the role of the presiding officer during sentencing, and the acceptance of evidence aimed at assisting the court in understanding the effect of the crime on the victim.

### 3.2 The Sexual Offences Draft Bill<sup>59</sup>

The South African Law Commission recommended that a law be promulgated to consolidate and amend the law relating to sexual offences. The Preamble states that the Bill is meant to protect complainants of sexual offences and put in place measures that will enable the relevant organs to give full effect to the provisions of the Act.

In terms of the Sexual Offences Bill, a sexual offence is defined as any offence in terms of the Bill and includes any common law sexual offence.<sup>60</sup> The definition of rape is now gender-neutral and no longer centres on the presence or lack of consent. It occurs when a person intentionally and unlawfully commits an act of sexual penetration.<sup>61</sup> An act of penetration is regarded as *prima facie* unlawful if committed under co-ercive circumstances, under false pretences or by use of threats.<sup>62</sup>

All children (including those below the age of eighteen years) are competent to give evidence in sexual offence cases. A child may only be barred from giving evidence if he or she does not have the capacity, verbal or otherwise, to respond

<sup>56</sup> See fn 11 above.

<sup>57</sup> 779B-C.

<sup>58</sup> 2002 1 SACR 116 (SCA).

<sup>59</sup> As introduced by the South African Law Commission Project 107 *Sexual offences: Process and procedure* (2001), hereafter referred to as the Sexual Offences Bill.

<sup>60</sup> Eg rape, incest and indecent assault.

<sup>61</sup> Sexual penetration is defined as any act which causes penetration to any extent whatsoever, by the genital organs of another person or any object, including any part of the body of an animal, or part of the body of one person into the anus or genital organs of another person in a manner which simulates sexual intercourse.

<sup>62</sup> The list is not exhaustive.

to simple questions.<sup>63</sup> I am of the view that competence in terms of the Sexual Offences Bill is determined by the child's ability to answer simple questions in a manner that can be understood, not by his or her age. Answering questions in a way that can be understood is crucial because the court has a duty in all criminal proceedings to establish the truth.<sup>64</sup> It is asserted that, although the judge is no longer bound to investigate a child's competence to give evidence (unless he or she has reason to doubt it), it might still be necessary to remind the child of the importance of telling the truth. This can be done gently, using age-appropriate language; a reminder may be stated in this manner: "Tell us all you can remember of what happened. Don't make anything up or leave anything out. This is very important".<sup>65</sup>

Evidence relating to the psycho-sexual effects of the crime may be admitted in sexual offence cases to show that the offence is likely to have been committed. I am of the view that the choice of words used here is significant. The expert is considering sexual abuse as one of the offences that might have been committed. In order to decide on the weight to be attached to an expert's opinion, the court has to take into account his or her qualifications and experience, and any other corroborative evidence given in the proceedings.<sup>66</sup> I am of the view that judicial officers should always consider the role of an expert as an advisory one. Moreover, a conclusion by an expert that a child exhibits psycho-sexual effects should not automatically be linked to the alleged perpetrator.

Some experts have argued correctly, in my view, that expert testimony should only be admissible to cast light on the individual behaviour observed in the complainant. They must not render an opinion that particular behaviour or set of behaviours observed in the victim indicate that sexual assault has occurred or is likely to have occurred.<sup>67</sup> Holmes is of the view that expert testimony should be admitted in so far as it is intended to explain the dynamics surrounding victims and victimisation. An expert may give an opinion on symptoms that can be exhibited by a child who has been traumatised, but this has to be qualified by a statement that a child might have suffered another form of abuse or trauma.<sup>68</sup>

Section 19 of the Sexual Offences Bill provides that, in proceedings at which an alleged offender is accused of a sexual offence, an adverse inference should not be drawn from the length of time between the alleged commission of the offence and the laying of a complaint. Delay in reporting the offence should not be used to undermine or challenge the reliability of the complainant. I am of the view that a sub-section should be inserted in this section, allowing an expert to explain to the court factors that may cause delay or informing the court that such behaviour is common in sexually abused children, although it is not indicative of

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63 S 10(1).

64 S 11.

65 Pigot Report (1989) para 5.15 (HMSO UK).

66 S 18(2)(a) and (b).

67 Holmes "Child sexual abuse accommodation syndrome: Curing the effects of a misdiagnosis in the law of evidence" 1989 *Tulsa LJ* 143 144-145.

68 Myers *et al* 86; see also Lewis "Reliability rather than zealotry - Kentucky should continue to prohibit testimony of child sexual abuse accommodation syndrome" 1988 *Kentucky Bench and Bar* 23. These may include intimidation of the perpetrator or other family members.

sexual abuse. It is my assertion that expert testimony of this nature is crucial to disabuse courts of commonly held misconceptions about child sexual abuse.<sup>69</sup>

#### 4 CONCLUSION

I am of the view that, although behavioural experts should be allowed to give evidence in child sexual abuse cases, boundaries should be drawn. An expert should not be allowed to give an opinion on the legal or general merits of the case, or proffer an opinion on the ultimate issues that the court has to decide. Judicial officers should take the following factors into account:

- Courts should always be allowed to rely on expert evidence whenever the outcome of a case depends solely on the evidence of a child witness. An expert can give an explanation of recantation or retraction of prior reports by the complainant, or on issues relating to child development, children's memories, suggestibility, lack of reporting by the non-offending parent, and delay in reporting the alleged offence by the complainant.
- Expert evidence, stipulating factors that warrant inferences as to who the perpetrator might be, should be admitted, but not if the testimony is to the effect that the accused is in fact the perpetrator.
- Expert evidence on the question of whether forced intercourse took place should be admissible, but not on the question whether the accused committed the illegal act.
- Courts should as far as it is possible rely upon laboratory experts. Evidence is usually provided by a forensic analyst who gathers information by examining biological material found during a medical examination of the victim. This examination usually consists of a DNA analysis. In *S v R*<sup>70</sup> Wallis J commented on DNA tests in rape cases by stating that courts have developed cautionary rules where cases are sexual in nature because of false allegations of rape, and the consequences that may arise from a false conviction. The judge asserted that DNA testing in rape cases can go a long way towards liberating men from their fear of being falsely accused of rape, and can protect women from the humiliating evidence that they are frequently subjected to when testifying in courts.<sup>71</sup>

The writer supports the argument that no one behavioural symptom or set of symptoms can be taken as diagnostic of abuse. Therefore experts have a moral obligation to inform the court about the limits of their professional training and experience.

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69 A child who has been abused will report the abuse immediately or that a child can't be abused by a close family friend or parent.

70 2000 1 SACR 33 (W).

71 39F-H.